Subject Index.

PAGE

Petition for Writ of Certiorari 1

Opinion Below 2

Jurisdiction 2

Questions Presented 3

Point I. The petitioners, though full-blood restricted members of the Five Civilized Tribes of Indians are protected by the Constitution of the United States in their property rights the same as other citizens of the United States 3

Point II. The record here shows that petitioners obtained a valid binding judgment for 100 acres of land in Carter County, Oklahoma, based on the decision of this Court in the case of United States v. Hellard, 322 U. S. 365, and quieted the title thereto in your petitioners and against the respondents. After the final judgment was rendered, the Congress of the United States passed what is known as a curative statute being Public Law 116-70th Congress, Chap. 223 and the question here arises as to the constitutional authority of Congress to enact this statute, the effect of which amounts to the taking of the 100 acres of land from your petitioners and vesting the title thereto in the respondents 3

Summary Statement of Matters Involved 3

Reasons Relied Upon for Issuance of Writ 7

Specification for Errors 8

INDEX CONTINUED

PAGE

Brief in Support of Petition for Writ of Certiorari 10

I. Opinion of the Court Below 10

II. Jurisdiction 11

III. Statement of the Case 11

IV. Specification of Errors 12

V. Argument 12

Proposition One. An Indian is protected in his private rights in the same manner and to the same effect as a white person 15

Proposition Two. The Act of Congress of July 2, 1945, known as Public Law 116-79th Congress, Chap. 223, is unconstitutional and void for the reason that it attempts to transfer property from one person to another 15

Summary Argument 17

Conclusion 18

Authorities.

TABLE OF CASES:

Ange v. Owens, 31 S. E. (2d) 521 16

Barney v. Baltimore City, 6 Wall. 280, 284 and 285 ... 17

Booth v. Hariston, 136 S. E. 879, 57 A. L. R. 1186, 1192 .11,17

Campbell v. Hope, 115 U. S. 620 .....11, 17, 18

Chase v. Trout, 80 Pac. 81 16

Choat v. Trapp, 224 U. S. 665, 58 L. Ed. 941 15

Combes v. Getz, 285 U. S. 434, 442 (1932) 17

Frederick v. Douglas County, 155 Pac. (2d) 925 16

Genzer v. Fillip, 132 S. W. (2d) 730 16

CASES (Continued):

PAGE

Gibbs v. Zimmerman, 290 U. S. 326, 332 17
Grisso v. United States, 138 Fed. (2d) 996 .....15-16, 17

Hodges v. Snyder, 261 U. S. 600 .....11, 17-18

Israel v. Arthur, 1 Pac. 438 16

Miller v. McKenna, 147 Pac. (2d) 531 16
Montgomery v. Town of Brandord, 142 Atl. 574 .....11, 17

Neal v. Travelers Insurance Company, 188 Okla. 131 .. 16

Pettis v. Johnston, 78 Okla. 277 16
People v. Van Nuys Lighting District, 162 Pac. 97 16

Roche v. Waters, 19 Atl. 535 16

Taylor v. Green, 129 Pac. (2d) 1013 16

United States v. B. W. Hellard, 322 U. S. 363 .....13, 16, 17

Ward v. Howard, 7 S. E. (2d) 625 .....11, 16, 17
Willis v. Hudson, 29 Atl. 604 16

TABLE OF STATUTES:

Public Law 116, 79th Congress, Chap. 223, 1st Session 5-6
Public Law 116, 79th Congress, Chap. 223, Sec. 3 6
Public Law No. 116-79th Congress, Chap. 231, Sec. 3 ..13-14

TEXT BOOKS AND ENCYCLOPEDIAS:

11 Amer. Juris., Sec. 375, p. 1205, Sec. 382, p. 1212 17

16 C. J. Secundum, para. 427, p. 878, para. 422, p. 876 .. 17

Cooley on Constitutional Limitations, 8th Ed., p. 776 .. 16

Sutherland Statutory Construction, 3rd Ed., Sec. 2206 16

Appendix follows brief.

No. ————

In the

Supreme Court of the United States

(October Term, 1946)

Sina Frazier now Postoak, Willie Watson, Richard Watson, Lula Carney, Calvin Carney, Billy Carney, James Carney, Hubert Carney and Gladys Carney, and United States of America,

Petitioners,

VERSUS

C. B. Goddard, E. L. Franklin, A. J. Erlewine, Sam Postoak and Bernice Postoak,

Respondents.

PETITION FOR WRIT OF CERTIORARI

The petitioners, Sina Frazier now Postoak, Willie Watson, Richard Watson, Lula Carney, Calvin Carney, Billy Carney, James Carney, Hubert Carney and Gladys Carney, and United States of America respectfully pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals from the Tenth Circuit in that certain cause therein entitled C. B. Goddard, E. L. Franklin, A. J. Erlewine, Sam Postoak, and Bernice Postoak, appellants v. Sina Frazier now Postoak, Willie Watson, Richard Watson, Lula Carney, Calvin Carney, Billy Carney, James Car-

ney, Hubert Carney and Gladys Carney and United States of America, appellees, being therein 3281. Said judgment was entered by said Circuit Court of Appeals on the 19th of July, 1946. The decision in the case has not been officially reported, but is shown at page 125 of the printed transcript of record.

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit in this cause is set forth in full in the record at page 125 and is copied at length in the appendix of this petition.

JURISDICTION

The jurisdiction of this Court is invoked under Sections 240 of the Jurisdictional Code as amended in 28 U. S. C. A. 347, an Act of Congress of February 13, 1925, Chap. 229, 43 Stat. 9635, Section 240A, amended May 22, 1939. This petition for writ of certiorari is filed within three months after the filing of said opinion and judgment (July 19, 1946). This application for writ is presented the .. day of September, 1946, and is made pursuant to Paragraph 5 (b) of Rule 38 of the Rules of this Court and in particular the part thereof which suggests that a writ of certiorari may issue where a Circuit Court of Appeals has rendered a decision in conflict with applicable decisions of this Court and has decided an important question of Federal law which has not been but should be settled by this Court, and has given an erroneous construction of Section 3 of Public Law 116-

79th Congress, Chap. 23, and has given an erroneous interpretation and construction of the due process clause of the Constitution of the United States.

QUESTIONS PRESENTED

Point I.

The petitioners, though full-blood restricted members of the Five Civilized Tribes of Indians are protected by the Constitution of the United States in their property rights the same as other citizens of the United States.

Point II.

The record here shows that petitioners obtained a valid binding judgment for 100 acres of land in Carter County, Oklahoma based on the decision of this Court in the case of *United States* v. *Hellard*, 322 U. S. 365, and quieted the title thereto in your petitioners and against the respondents. After the final judgment was rendered, the Congress of the United States passed what is known as a curative statute being Public Law 116-70th Congress, Chap. 223 and the question here arises as to the constitutional authority of Congress to enact this statute, the effect of which amounts to the taking of the 100 acres of land from your peitioners and vesting the title thereto in the respondents.

SUMMARY STATEMENT OF MATTERS INVOLVED

This action was commenced in the District Court of Carter County on January 5, 1943, by your petitioners against the respondents to recover the possession of and to quiet the title to 100 acres of land in Carter County,

Oklahoma. The land was a portion of the homestead allotment of Narcissa Watson, deceased, a full-blood Choctaw Indian Roll No. 12096. Your petitioners predicated their right of recovery upon the allegations contained in their petition that they were the sole and only heirs at law of said deceased patentee (R. 1-3).

Notice of the filing of said action was served upon the Superintendent of the Five Tribes of Indians and the United States of America removed said cause to the United States District Court for the Eastern District of Oklahoma as is provided for by Section 3 of the Act of Congress of 1926, being an Act to amend Section 9 of the Act of May 27, 1928 (35 Stat. L. 312) approved April 12, 1926.

The respondents filed their answer in the cause asserting title in themselves by virtue of a sheriff's deed in partition in a prior cause in the State District Court in cause No. 20396. The petitioners and the United States of America claimed and asserted that the sheriff's deed relied upon by respondents was void for the reason that no notice of the pendency of said partition suit was served upon the Superintendent of the Five Civilized Tribes as required by the provisions of Section 3 of the Act of Congress of 1926, approved April 12, 1926 (R. 52-8). On trial of the issues and on January 19, 1944 judgment was rendered in favor of respondents. An appeal was perfected to the Tenth Circuit Court of Appeals and while said appeal was pending this Court handed down the opinion in the case of *United States* v. *Hellard*, 322 U. S. 363. The Court of Appeals for the Tenth Circuit reversed the judgment of the United States

District Court for the Eastern District of Oklahoma of date January 19, 1944, and remanded said cause to the United States District Court for further proceedings not inconsistent with the decision of the Supreme Court of the United States in the case of *United States* v. *Hellard*.

A second trial of the cause was had and on April 29, 1945 a judgment was rendered in favor of your petitioners and the intervenor, the United States of America, wherein it was adjudged and decreed that the aforesaid partition proceeding and sheriff's deed executed pursuant thereto were void and of no effect and conveyed no right, title, claim or interest in and to said lands and by the same judgment your petitioner's title to said 100 acres of land was quieted in them (R. 78-83).

Respondent filed a motion for new trial and while said motion for new trial was pending, Congress passed a curative Act entitled H. R. 2754 (Public Law 116, 79th Congress, Chap. 223, 1st Session), the pertinent part of which reads as follows:

> "Sec. 3. That no order, judgment, or decree in partition made, entered, or rendered subsequent to the effective date of the Act of June 14, 1918 (40 Stat. 606), and prior to the effective date of this Act, and involving inherited restricted lands of enrolled and unenrolled members of the Five Civilized Tribes, shall be held null, void, invalid, or inoperative, nor shall any conveyance of any land pursuant to such order, judgment or decree be held null, void, invalid, or inoperative because the United States was not a party to such order, judgment or decree, or to any of the proceedings in connection therewith or because the United States,

its agents, or officers, or any of them, was not served with any notice or process in connection therewith, and all such orders, judgments, decrees, and conveyances, which are subject to attack solely by reason of any of the infirmities enumerated by this section, are hereby confirmed, approved and declared valid."

On October 27, 1945 the trial court overruled the motion for new trial and an appeal was prosecuted to the United States Circuit Court of Appeals for the Tenth Circuit and on July 19, 1946 the trial court judgment was reversed and remanded to allow the trial court to enter judgment in accordance with its express view and in accordance with the views expressed in the opinion and by which said decision of said United States Circuit Court of Appeals for the Tenth Circuit that court held the curative Act, Public Law 116, 79th Congress, Chap. 223, Section 3, constitutional, and by which decision the title of your petitioners so awarded to them by said judgment was divested from them and vested in the respondents. Your petitioners say that, although the United States is not prosecuting this petition for writ of certiorari, the United States was a party to the trial court judgment awarding the land to them and was a party to the proceedings in the Court of Appeals for the Tenth Circuit; that as wards of the United States and the United States as their guardian, they say they have a right to insist that the United States join them in requesting a review by certiorari, the questions involved in this case. That no withdrawal from this litigation has been made by the United States.

Your petitioners further state that as the legal and equitable owners of the 100 acres of land in controversy, not only as the sole and only heirs of Narcissa Watson, deceased, the title thereto being quieted in them by a court of competent jurisdiction, that when Congress passed the curative act, being Public Law 116-79th Congress, H. R. 2754, Sec. 3 thereof, that the effect of this legislation would amount to the taking of their property without their consent and vesting the same in the respondents. This your petitioners say violates the due process clause of the Federal Constitution.

Further essential facts of the case are stated in the opinion of the Tenth Circuit Court of Appeals (R. 125) and Appendix to this petition.

REASONS RELIED UPON FOR ISSUANCE OF WRIT

The reasons relied upon briefly stated are:

(1) The Tenth Circuit Court of Appeals held that although your petitioners had a valid judgment quieting title in them, that the Congress of the United States had a constitutional right to pass the Curative Act retroactively and cure the jurisdictional defect in the partition proceeding and your petitioners say that, although, they are full-blood restricted Indians of the Five Civilized Tribes, they are citizens of the United States and are guaranteed the same rights and privileges as other citizens of the United States.

(2) The questions presented by the record, as stated above, should be reviewed by this Court for the reason that

by the decision of the Tenth Circuit Court of Appeals the power of Congress is supreme and amounts to a legislative judgment thereby establishing an unprecedented rule that the power of Congress cannot be inquired into although private property is taken from one person and given to another.

SPECIFICATION FOR ERRORS

(1) The Circuit Court of Appeals erred in finding and holding that the petitioners, although, full-blood restricted Indians of the Five Civilized Tribes of Indians are not entitled to the protection of the due process clause of the Federal Constitution.

(2) The court erred in holding Public Law 116-79th Congress, H. R. 2754 as applied to the facts in the case under consideration constitutional, the effect of which decision is to divest the petitioners of their title to the 100 acres of land and vest the title thereto in respondents.

Petitioners respectfully represent that said questions properly appear in the record and were raised before the trial court and the Court of Appeals for the Tenth Circuit.

WHEREFORE, you petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Tenth Circuit, requiring said court to certify and send to this Court a full and compete transcript of the record and proceedings in the Court of Appeals in the case therein numbered 3281 entitled C. B. Goddard et al., appellants v. Sina Frazier et al., appellees, to be reviewed

and determined by this Honorable Court as provided by law; that the judgment of said Circuit Court of Appeals herein be reversed by this Honorable Court and for such further relief as this Court may deem proper and just in the premises.

HUGH A. LEDBETTER,
GUY H. SIGLER,
Counsel for Petitioners.

PRINCE M. JACKSON,
of Counsel.

No. ————

Supreme Court of the United States

[October Term, 1946]

Sina Frazier now Postoak, Willie Watson, Richard Watson, Lula Carney, Calvin Carney, Billy Carney, James Carney, Hubert Carney, and Gladys Carney, and United States of America,

Petitioners,

VERSUS

C. B. Goddard, E. L. Franklin, A. J. Erlewine, Sam Postoak and Bernice Postoak,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF THE COURT BELOW

This is an application for writ of certiorari from the opinion of the United States Circuit Court of Appeals for the Tenth Circuit in a certain case styled C. B. Goddard, E. L. Franklin, A. J. Erlewine, Sam Postoak and Bern*iece* Postoak, Appellants, v. Sina Frazier, now Postoak,, Willis Watson, Richards*on* Watson, Lula Carney, Calvin Carney, Billy Carney, James Carney, Hubert Carney, and Gladys Carney and United States of America, Appellees, decided July 19, 1946 and not yet officially reported. For opinion see printed record page 125.

II.

JURISDICTION

1. The jurisdiction of this Court is invoked under Sec. 240 of the Jurisdictional Code as amended in 28 U. S. C. A. 347, Act of Congress of February 13, 1925, Chap. 229, 43 Stat. 9635, Sec. 240-A amended May 22, 1939.

2. This application for writ of certiorari is from a judgment and opinion of the Circuit Court of Appeals for the 10th Circuit dated July 19, 1946.

3. This case involves the constitutionality of Section 3 of Public Law 116-79th Congress, Chap. 223, see opinion of the Circuit Court of Appeals for the 10th Circuit, Transcript of Record, page 125, and memorandum opinion of the United States District Court of the Eastern District of Oklahoma, Record page 85.

4. The decision of the Circuit Court of Appeals for the 10th Circuit is in direct conflict with the decisions of this Court. *Campbell* v. *Hope*, 115 U. S. 620; *Montgomery* v. *Town of Brandord*, 142 Atl. 574; *Ward* v. *Howard*, 7 S. E. (2d) 625; *Booth* v. *Hariston*, 136 S. E. 879, 57 A. L. R. 1186; *Hodges* v. *Snyder*, 261 U. S. 600.

III.

STATEMENT OF THE CASE

Concise statement of this case is set out beginning on page 2 of the petition for writ of certiorari and for brevity will not be repeated here.

IV.

SPECIFICATION OF ERRORS

The petitioners allege error in the holding of the United States Circuit Court of Appeals for the 10th Circuit wherein they held that Public Act No. 116-79th Congress, H. R. 2754, entitled "An Act to validate title to certain land conveyed by Indians of the Five Civilized Tribes" is constitutional and we assert that said Act is unconstitutional in that it takes away from your petitioners their property without due process of law.

V.

ARGUMENT

The land in question was allotted to Narcisso Watson who was a full-blood member of the Choctaw Tribe of Indians enrolled opposite 12096. Said lands were allotted to said Narcissa Watson as a part of her homestead. Narcissa Watson died intestate while a resident of Carter County, Oklahoma on or about the 1st day of April, 1926, and left surviving her as her sole and only heirs, Sina Frazier, Willie Watson, Richard Watson, and Allen Carney, all full-blood Indians. Thereafter on or about the 12th day of April, 1928, Allen Carney died and left surviving him as his heirs his wife, Lula Carney and his children, Calvin Carney, James Carney, Hubert Carney and Gladys Carney, all full-blood Indians. Thereafter there was filed in the District Court of Carter County, Oklahoma a suit in partition in which Calvin Carney, James Carney, Hubert Carney and Gladys Carney, by their mother, Lula Carney, and Lula

Carney, were plaintiffs, and Sina Frazier and Willis Watson and Richardson Watson were defendants (Tr., p. 11). The United States Government was not made a party in this action and the property was partitioned and sold by the Sheriff of Carter County, Oklahoma. Thereafter all the heirs of said Narcissa Watson filed in the District Court of Carter County, Oklahoma suit against C. B. Goddard, A. J. Erlewine, C. W. Tomlinson, E. L. Franklin, Sam Postoak, Berniece Postoak and John Steele Batson, to recover said land (Tr., pp. 1 to 3). The United States Government was made a party in this action and they transferred said case to the United States District Court in and for the Eastern District of Oklahoma (Tr., p. 51). In this case it was asserted that the partition sale was void for the reason that the Government was not made a party in this action. On January 19, 1944, a judgment was rendered in that case in favor of the respondents and upon an appeal to the Circuit Court of Appeals and relying upon the case of *United States* v. *B. W. Hellard*, 322 U. S. 363, the cause was reversed and the lower court was directed to enter judgment for the petitioners. The cause was tried in the United States District Court for the Eastern District of Oklahoma and under the authority of the *Hellard* case above cited, judgment was rendered in favor of the petitioners (Tr., p. 78). The respondents then filed a motion for new trial and while said motion was pending and before it was acted upon, Congress passed the Act of July 2, 1945, known as Public Law No. 116-79th Congress, Chap. 231, Sec. 3, thereof which reads as follows:

> "That no order, judgment, or decree in partition made, entered or rendered subsequent to the effective date of the Act of June 14, 1918, (40 Stat. 606), and prior to the effective date of this Act, and involving inherited restricted lands of enrolled and unenrolled members of the Five Civilized Tribes, shall be held null, void, invalid, or inoperative, nor shall any conveyance of any land pursuant to such order, judgment or decree be held null, void, invalid, or inoperative because the United States was not a party to such order, judgment or decree or to any of the proceedings in connection therewith, or because the United States, its agents or officers, or any of them was not served with any notice or process in connection therewith, and all such orders, judgment, decrees, and conveyances which are subject to attack solely by reason of any of the infirmities enumerated by this section are hereby confirmed, approved and declared valid."

Thereafter the United States District Court overruled said motion and the respondents appealed to the Circuit Court of Appeals and upon hearing in the Circuit Court of Appeals for the 10th Circuit, the judgment of the District Court for the Eastern District of Oklahoma was reversed and said court was directed to enter a judgment for the respondents.

Proposition One.

An Indian is protected in his private rights in the same manner and to the same effect as a white person. *Choat v. Trapp*, 224 U. S. 665, 58 L. Ed. 941.

Proposition Two.

The Act of Congress of July 2, 1945, known as Public Law 116-79th Congress, Chap. 223, is unconstitutional and void for the reason that it attempts to transfer property from one person to another.

The land in question was allotted to a full-blood Indian. Upon her death it was inherited by her children, who were also full-blood Indians and upon the death of Alan Carney, his one-fourth interest descended to his wife and children, all of whom were full-blood Indians.

Under the law, these Indians could dispose of this property in two ways, that is, the restrictions upon alienation could be removed in two separate manners. The first one was by a deed to be approved by the county judge of the county where the Indian died. The second one was in a partition suit in the district court of Oklahoma wherein the government was made a party.

It is our contention that the District Court of Carter County, Oklahoma would not have authority to remove the restrictions from these full-blood Indians and sell the land unless the government was made a party and that by reason of the government not being made a party, the judgment partitioning the property was void for the reason that the district court in that action would have no right to remove the Indians' restrictions. *Grisso* v. *United States*,

138 Fed. (2d) 996; *United States* v. *Hellard,* 322 U. S. 363; *Taylor* v. *Green,* 129 Pac. (2d) 1013. A judgment which is void upon its face and requires only an inspection of the judgment roll to demonstrate its want of validity is a "dead limb upon the judicial tree which may be lopped off at any time, it can bear no fruit to the plaintiff, but is a constant menace to the defendant, and may be vacated by the court rendering it at any time on motion of a party or any person affected thereby, either before or after the expiration of three years from the rendition of such void judgment. Such motion is unhampered by a limitation of time." See *Pettis* v. *Johnston,* 78 Okla. 277; *Neal* v. *Travelers Insurance Company,* 188 Okla. 131. If the judgment is void, then the question arises: Has Congress the right at a later date to pass an Act which would divest these Indians of their land?

As a general proposition, it is said that a jurisdictional defect in a judgment cannot be cured by retroactive legislation without denial of due process of law. *People* v. *Van Nuys Lighting District,* 162 Pac. 97; *Miller* v. *McKenna,* 147 Pac. (2d) 531; *Ward* v. *Howard,* 7 S. E. (2d) 625; *Ange* v. *Owens,* 31 S. E. (2d) 521; *Genzer* v. *Fillip,* 132 S. W. (2d) 730; *Israel* v. *Arthur,* 1 Pac. 438; *Willis* v. *Hudson,* 29 Atl. 604; *Roche* v. *Waters,* 19 Atl. 535; *Frederick* v. *Douglas County,* 155 Pac. (2d) 925; *Chase* v. *Trout,* 80 Pac. 81; Cooley on Constitutional Limitations, 8th Ed., p. 776; Sutherland Statutory Construction, 3rd Ed., Sec. 2206. The doctrine is based upon the sound principle that curative acts cannot cure want of authority to act at all, or validate or infuse life into utterly void proceedings without taking the property of one person and transferring it to another in viola-

tion of due process. *Campbell* v. *Hope*, 115 U. S. 620; *Montgomery* v. *Town of Brandord*, 142 Atl. 574; *Ward* v. *Howard*, 7 S. E. (2d) 625; *Booth* v. *Hariston*, 136 S. E. 879, 57 A. L. R. 1186, 1192. See, also, *Hodges* v. *Snyder*, 261 U. S. 600. The defect is not incurable unless the remedy violates due process.

A partition suit in the absence of an indispensable party is absolutely void. *Barney* v. *Baltimore City*, 6 Wall. 280, 284 and 285. If the Indian owners should be held to have only a right to bring this suit and recover the property, then Congress would be taking from them, by Section 3, the right to maintain an action rather than the title itself. The right to maintain an action is entitled to the same protection that is accorded a vested title and cannot be taken from the Indians by legislative action. *Gibbs* v. *Zimmerman*, 290 U. S. 326, 332; *Combes* v. *Getz*, 285 U. S. 434, 442 (1932); 16 C. J. Secundum, paragraph 427, page 878, paragraph 422, page 876; 11 American Jurisprudence, Sec. 375, page 1205, Sec. 382, page 1212.

SUMMARY ARGUMENT

Point A. Your petitioners state that the decision in the court below was in direct conflict with the decisions of the courts in the case of *Grisso* v. *United States*, 138 Fed. (2d) 996; *United States* v. *Hellard*, 322 U. S. 363; *Campbell* v. *Hope*, 115 U. S. 620; *Hodges* v. *Snyder*, 261 U. S. 600, and other cases cited above.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power in order that the questions of the authority of Congress in passing Public Law 116-79th Congress, H. R. 2754, entitled "An Act to Validate Title to Certain Land Conveyed by Indians of the Five Civilized Tribes," may be settled, which Act we assert is unconstitutional and void in that it takes away from your petitioners their rights without due process of law and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals and reverse it.

Respectfully submitted,

HUGH A. LEDBETTER,
GUY H. SIGLER,
Counsel for Petitioners.

PRINCE M. JACKSON,
Of Counsel.

September, 1946.

APPENDIX

United States Circuit Court of Appeals
TENTH CIRCUIT.

No. 3281—MAY TERM, 1946.

G. B. Goddard, E. L. Franklin, A. J. Erlewine, Sam Postoak, and *Berenice* Postoak,
Appellants,
vs.
Sina Frazier, now Postoak, *Willis* Watson, *Richardson* Watson, Lula Carney, Calvin Carney, Billy Carney, James Carney, Hubert Carney, Gladys Carney, and United States of America,
Appellees.

Appeal from the United States District Court for the Eastern District of Oklahoma.

[July 19, 1946.]

Stephen A. George (R. A. Howard was with him on the brief) for Appellants.

H. A. Ledbetter and P. M. Jackson (Guy H. *Stigler* was with them on the brief) for Appellees.

Before PHILLIPS, BRATTON and MURRAH, Circuit Judges.

MURRAH, Circuit Judge, delivered the opinion of the court.

This appeal involves the constitutionality of Section 3 of Public Law 116, 79th Congress, Chap. 223, designed to retroactively cure defects in Indian land titles resulting

from the decision of the Supreme Court in United States v. Hellard, 322 U. S. 363. In that case it was held, under facts not materially different from ours, that in view of the large governmental interests in restricted Indian lands, the United States was a necessary party to a proceedings in the state court to partition restricted Indian lands under Section 2 of the Act of June 14, 1918, 25 U. S. C. A. 355, 40 Stat. 606.[1] Hence, a judgment of the state court in a proceedings to partition restricted Indian lands to which the United States was not a party in accordance with Section 3 of the Act of April 12, 1926, 44 Stat. 239, was declared void and ineffectual to alienate the restricted land of the Indian ward.

Thereafter and before this judgment, based on the authority of the Hellard case, became final, the Congress enacted the curative statute, *supra*, Section 3 of which pertinently provided in effect that no order, judgment or decree in partition made or rendered subsequent to the effective date of the Act of June 14, 1918, and prior to July 2, 1945, involving inherited restricted lands of members of the Five Civilized Tribes should be void or invalid because the United States was not a party to the proceedings and judgment, or because the United States, its agents, officers, or any of them, was not served with notice of process in connection with such orders, judgments or proceedings, and all conveyances subject to attack solely by reason of the enumerated infirmities were confirmed, approved and declared valid.

---

[1] Under this statute, lands of the full-blood members of the Five Civilized Tribes were made subject to the laws of the State of Oklahoma providing for the partition of real estate, and provided that any land allotted to a full-blood Indian in partition proceedings should remain subject to all restrictions upon alienation and taxation obtaining prior to the partition. But in case of a sale under any decree or partition, the conveyance thereunder operated to relieve the land thus conveyed of all restrictions of every kind. See Grisso v. United States, 138 F. 2d 996, 1000; United States v. Hellard, 322 U. S. 363; Taylor v. Green, 129 P. 2d 1013.

Our facts fall squarely within the intendment of the curative statute. Narcissa Watson, a full-blood Choctaw Indian, resident of Carter County, Oklahoma, died on or about April 1, 1926, seized of her restricted allotment, which descended to her four children, also Choctaw Indians of the full-blood. On April 13, 1934, the widow of one of her children, Allen Carney, for herself and her minor children, filed suit in the District Court of Carter County to partition the inherited and restricted land in accordance with the Act of June 14, 1918, supra (see footnote 1). Service was had upon the other heirs, but the United States was not made a party to the suit or given notice thereof. The United States probate attorney, however, appeared and participated in the litigation without specific directions from the Department of the Interior. The court having found that the land was not subject to partition in kind, it was sold as provided by law for the appraised value of $2,000 and a sheriff's deed was issued and confirmed to J. B. Lewis, as purchaser, who thereafter sold and conveyed the same to C. D. Goddard, one of the appellants here.

Thereafter and in January, 1943, the parties to the partition proceedings as the restricted heirs of Narcissa Watson, brought this suit against the record owners to quiet their title to 100 acres of the allotment, alleging that as the sole and only heirs of Narcissa Watson, they inherited the fee simple title to the property according to the laws of descent and distribution, and were therefore entitled to the possession of same free and clear of any claim of the defendant record owners. Notice of the pendency of the suit was duly filed upon the Superintendent of the Five Civilized Tribes in accordance with Section 3 of the Act of April 12, 1926, and the United States removed the same to the Federal court in accordance with the Act.

When the defendants relied upon the sheriff's deed issued in pursuance of judgment of the state court in the partition proceedings, the appellees here, joined by the Gov-

ernment replied that the said deed was void and conveyed no title because the United States was not a party or given notice of the partiton proceedings. The trial court gave judgment in accordance with the decision of this court in United States v. Hellard, 138 F. 2d 985. During the pendency of an appeal to this court, the United States reversed our decision in the Hellard case, and we accordingly reversed this case with directions to proceed in accordance with the decision of the Supreme Court in the Hellard case without prejudice however to the right of the appellees there (appellants here) to produce evidence in support of their contention that the participation of the United States probate attorney in the partition proceedings operated to effectively bind the United States to the state court judgment.

On remand and in pursuance of our mandate, the trial court, after hearing, concluded that the participation of the United States probate attorney in the partition proceedings did not operate to bind the United States to the judgment. It then proceeded to enter judgment in favor of the Indian heirs and the United States as intervenors in accordance with the pronouncements of the Supreme Court in the Hellard case. Upon consideration of the motion for new trial after the passage of the curative Act, the trial court was of the opinion that the Act did not deprive the Indian heirs of their property without due process of law, and was therefore a valid curative statute. Deeming itself bound however by the mandate of this court to enter judgment in accordance with the decision in the Hellard case, and having concluded that the Government was not a party to the partition proceedings by reason of the appearance and participation of the probate attorney, it rendered judgment quieting the title to the land in question in the Indian heirs. This appeal is from that judgment.

We agree with the trial court that the appearance and participation of the United States probate attorney in the

partition proceedings did not bind the United States to the judgment. Under Section 6 of the Act of May 27, 1908, 35 Stat. 312-314, it is a part of the duties of United States probate attorneys to counsel and advise all allottees having restricted lands of their legal rights without charge, and if necessary to bring suit in the name of an allottee to cancel and void any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other incumbrance of any kind made in violation of the Act. By Section 8 of the Act of January 27, 1933, 46 Stat. 777-779, it became the duty of the United States probate attorneys to appear and represent any restricted member of the Five Civilized Tribes before the county courts of any county of the State of Oklahoma, or any appellate court thereof in any matter in which the restricted Indian may have an interest. But there is nothing in the statutes or their context indicating a Congressional intention that the probate attorney is authorized to enter the appearance of the United States, or that the United States is bound by any judgment in a proceedings wherein he has thus participated. The probate attorney represents the Indian, not the United States. Indeed, the manifest purpose of the Act of April 12, 1926, supra, was to make it possible to obtain a judgment which would be binding and conclusive as to the United States. Town of Okemah v. United States, 140 F. 2d 963; Caesar v. Burgess, 103 F. 2d 503.

Section 3 of the Act of April 18, 1912, 37 Stat. 86, conferred jurisdiction upon the Oklahoma courts having probate jurisdiction to administer the estates of Osage Indian allottees, and determine heirship in such cases. Section 6 provided for partition by the heirs of restricted lands inherited from allottees in accordance with the laws of the State of Oklahoma. We held in United States v. Drummond, 144 F. 2d 375, that the United States was not bound by a judgment in a state court proceedings involving the lands of a restricted Osage Indian to which it was not a party, al-

though the Secretary of the Interior had authorized the employment of counsel for the Indian and approved the fees to be paid for services rendered in connection with the state court litigation. The Supreme Court affirmed, 324 U. S. 316, holding that to bind the United States when it was not a formal party, it must have a "laboring oar" in the controversy.

The more perplexng question is whether, as contended by appellee, the curative statute operated to deprive the restricted Indians of their property without due process of law. From the Hellard case, we have seen that the deed issued in pursuance of the state court judgment was void and therefore did not operate to alienate the property of the Indians, although they did everything within their power to effect an alienation. In Grisso v. United States, 138 F. 2d 996, we held that restricted Indian owners of land in joint tenancy were indispensable parties to a partition proceedings under the 1918 Act, and a deed issued in pursuance to a partition proceedings in which all joint tenants were not parties was void. We have also held that a deed by a full-blood Indian to lands inherited or devised from the allottee of such land was void unless approved by the proper county court in accordance with the Act of April 12, 1926. Ward v. United States, 139 F. 2d 79; United States v. Goldfeder, 112 F. 2d 617; Murray v. Ned, 135 F. 2d 407. See also Minnesota v. United States, 305 U. S. 382. In truth, courts have always been quick to vindicate the Congressional policy for the protection of the Indian ward, and to that end to void any conveyance of restricted land not in strict conformity with authorizing legislation.

As a general proposition, it is said that a jurisdictional defect in a judgment cannot be cured by retroactive legislation without denial of due process of law, while retroactive legislation designed to cure non-jurisdictional or modal defects is within the constitutional power of the legislature. People v. Van Nuys Lighting District, 162 P. 97; Miller v.

McKenna, 147 P. 2d 531; Ward v. Howard, 7 SE 2d 625; Ange v. Owens, 31 SE 2d 521; Genzer v. Fillip, 134 SW 2d 730; Israel v. Arthur, 1 P. 438; Willis v. Hudson, 29 A. 604; Roche v. Waters, 19 A. 535; Frederick v. Douglas County, 155 P. 2d 925; Chase v. Trout, 80 P. 81; Cooley on Constitutional Limitations, 8th Ed., P. 776; Sutherland Statutory Construction, 3rd Ed., Sec. 2206. The doctrine is based upon the sound principle that curative acts cannot cure want of authority to act at all, or validate or infuse life into utterly void proceedings without taking the property of one person and transferring it to another in violation of due process. Campbell v. Hope, 115 U. S. 620; Montgomery v. Town of Brandord, 142 A. 574; Ward v. Howard, 7 SE 2d 625; Booth v. Hariston, 136 SE 879, 57 ALR 1186, 1192. See also Hodges v. Snyder, 261 U. S. 600. The defect is not incurable unless the remedy violates due process. What constitutes a jurisdictional defect in terms of due process of law must necessarily be resolved by resort to the fundamental principles of due process itself, bearing in mind that the concept is indefinable by legalistic formulae, but is founded upon considerations of fundamental fairness. Betts v. Brady, 316 U. S. 455; Willoughby on Constitution, 2nd Ed., p. 1681.

In search of a ready test for determining the validity of a curative statute, the courts have established the rule that "a legislature may validate by subsequent act anything it might have authorized previously or may make immaterial anything it might have omitted in the original act." Sutherland, supra, sec. 2206. Mr. Cooley states the rule thus: "If the thing wanting or which shall fail to be done and which constitutes the defect in a proceedings is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute." Cooley, supra, p. 775. The United States Supreme Court quoted the foregoing statement by Mr. Cooley in the very early case of Mattingly v. District of Columbia, 97 U. S.

687, with the further statement that the Congress might cure irregularities and confirm proceedings which, without the confirmation, would be void because unauthorized, provided such confirmation does not interfere with intervening rights. See also McFaddin v. Evans-Snider-Buel Co., 185 U. S. 505.

Where the object and effect of the curative statute is to "correct an innocent mistake, remedy a mischief, execute the intention of the parties, and promote justice, then both as a matter of right and of public policy" the law is constitutionally valid. Cooley, supra, p. 781. To illustrate this abstract rule, Cooley cited the old case of Kearney v. Taylor, 15 How. 494, where a sale of real estate belonging to infant joint tenants had been made by an order of the court in a partition suit, and bought by a company of persons for the purpose of subdividing the same. The sale was confirmed in their names, but by mutual agreement the deed was made to one of the company for convenience in selling the parcels of land. The deed to the individual was declared void because not in conformity with the judicial sale. The legislature passed a curative statute providing that if the land was sold fairly for sufficient consideration and with the consent of the purchaser, it should have the same effect as though it was made directly to the purchaser. The court sustained this statute as not unconstitutional. Similarly, sales and conveyances under judgments defective because of a failure to properly serve summons have been validated; terms of court held without authority have been legalized; and judgments rendered by courts without jurisdiction have been constitutionally validated. See Sutherland, supra, Sec. 2218. Furthermore, a legislative act which cures the illegality or defect may be passed and become operative after suit is brought to enforce the rights accruing by reason of the illegality or defect. The bringing of the suit vests in a party no right to a particular decision. See United States v. Seinzen & Co., 206 U. S. 370, 387; C. R. I. & P. RR. v. Austin, 163 P. 517; Cooley, supra, p. 789.

Courts do not regard rights as constitutionally protected which are contrary to the equity and justice of the case. Cooley, supra, p. 784. And when the intent of the curative act is to achieve a result which will be recognized in a court of equity, a greater presumption of validity attaches to it and should be liberally construed to effectuate the salutary purpose. See Sutherland, supra, Sec. 2214. Our question then is whether by the enactment of the curative statute the Congress arbitrarily took the Indian's property by ratifying and validating the judicial proceeding by which all of the Indians intended to effect an alienation of the property they now claim, but failed only because the United States in its governmental capacity was an indispensable party. In making the lands of the full-blood members of the Five Civilized Tribes subject to the laws of Oklahoma for the partition of real estate, the Congress could have expressly dispensed with the necessity of making the United States a party to any such proceedings under the statute. Jurisdiction to partition the lands in question and to issue the deed here attacked was expressly conferred upon the state court which rendered the judgment. Its jurisdiction failed, not because it was nonexistent, but only because it was improperly invoked. The Indians fully intended to invoke the jurisdiction of the Court over their property, and by its processes to part with their title thereto, and no one doubted the success of their efforts until by rule of decision and indispensability of the United States as a party was established. The only right of the Indians is to have the United States made a party to the proceedings in order to have the benefit of its guardianship. The Indian has no greater interest and can assert no greater right in the land than that of the Government as his guardian.

By the curative statute, the Congress has waived its right to be a party to the proceedings and has thus confirmed and approved the judicial act by which the lands

were alienated. Furthermore, upon the enactment of the curative statute, the United States withdrew from this proceedings and does not now contest its validity. We thus have a Congressional finding that the defective judicial process did not violate the principles of substantial justice, and our independent consideration of the proceedings convinces us that the curative legislation did nothing more than give legal effect to the manifest intention of the parties. It is founded upon justice and equity, generated by the Congressional purpose to right a wrong, and it is therefore not unconstitutional.

In an effort to sustain the judgment of the trial court, notwithstanding the validity of the curative statute, appellees attack the sheriff's deed for irregularities in the state court proceedings, which, they insist, voided the deed. The irregularities complained of do not appear upon this record, nor were they noticed by the trial court in its judgment, from which this appeal was taken. It is said, however, that they were presented to and decided by the trial court in the former trial, and were presented to this court on appeal.

Apparently on the theory that we may take judicial notice of the record and proceedings in the former case, it is pointed out that the sheriff's return shows that he sold the 100 acres of land to J. B. Lewis as the highest bidder for $2,000, when in fact he only sold 75 acres to Lewis for $1,500; that Sina Frazier, now Postoak, elected to take the remaining 25 acres in lieu of her one-fourth interest in the proceeds of the sale; that Lewis did not pay the price for the land bid at the sale, but instead Goddard furnished the money; and that one of the attorneys for the Indians in the action also acted as attorney for Lewis.

It is sufficient to say that on the face of this record, and upon the record in the former appeal, the sheriff's sale and return thereon was conducted in compliance with the order of sale, which was in accordance with the authorizing

statutes. Title 12 O. S. A. 1513-14-16. There is nothing on this record or the record in the former proceedings tending to show that the appellees, as restricted Indians, were defrauded or overreached in any manner. There is nothing to show that the land was worth in excess of its appraised value, or that the Indians did not receive their proportionate share of the sale price. Since they received their proportionate share of the proceeds of the sale, it is immaterial whether the purchase price was paid by Lewis or by some one lese; or whether *Sena* Frazier received her share in land or in money. The sale was in compliance with the statute, was legal upon its face, and it is therefore valid. See Hargis v. Hargis, 73 P. 2d 1129.

The case is reversed and remanded to allow the trial court to enter judgment in accordance with its expressed views, and in accordance with the views expressed herein.

A true copy.

Attest:

Clerk U. S. Circuit Court of Appeals, Tenth Circuit.